59 (2)

No. 09-1091

IN THE

Supreme Court of the United States

OCEANIC EXPLORATION COMPANY, *et al.*,
Petitioners,

v.

PHILLIPS PETROLEUM COMPANY ZOC, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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April 9, 2010

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QUESTION PRESENTED

Should this Court review a unanimous decision of the Fifth Circuit dismissing petitioners' RICO, antitrust, and common-law claims for lack of proximate cause — as required by three separate decisions of this Court (*Associated General Contractors v. California State Council*, 459 U.S. 519 (1983), *Holmes v. SIPC*, 503 U.S. 258 (1992), and *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006)), and as confirmed by this Court's latest decision on the subject just this past January (*Hemi Group v. City of New York*, 130 S. Ct. 983 (2010)) — based upon petitioners' attempt to re-characterize this case as supposedly presenting issues under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), warranting this Court to "reconsider its rulings" in those two decisions?

RULE 29.6 STATEMENT

ConocoPhillips, a publicly held company, holds 10% or more of the stock, directly or indirectly, of the following respondents:

Phillips Indonesia Inc.;

Phillips International Investment Inc.;

ConocoPhillips Australia Pty. Ltd.;

ConocoPhillips Australia Gas Holdings Pty. Ltd.;

ConocoPhillips JPDA Pty. Ltd.;

ConocoPhillips Pipeline Australia Pty. Ltd.;

ConocoPhillips STL Pty. Ltd.;

ConocoPhillips WA-248 Pty. Ltd.;

ConocoPhillips (03-12) Pty. Ltd.;

ConocoPhillips (03-13) Pty. Ltd.;

ConocoPhillips (03-16) Pty. Ltd.;

ConocoPhillips (03-19) Pty. Ltd.;

ConocoPhillips (03-20) Pty. Ltd.;

ConocoPhillips (03-21) Pty. Ltd.;

ConocoPhillips Company;

Darwin LNG Pty. Ltd.

Tokyo Gas Co., Ltd., a publicly held company, holds 10% or more of the stock, directly or indirectly, of respondents Tokyo Timor Sea Resources Pty. Ltd. and Tokyo Timor Sea Resources, Inc.

Tokyo Electric Power Company, Inc., a publicly held company, holds 10% or more of the stock, directly or indirectly, of respondents Tokyo Timor Sea Resources Pty. Ltd. and Tokyo Timor Sea Resources, Inc.

Eni SpA, a publicly held company, holds 10% or more of the stock, directly or indirectly, of respondent Darwin LNG Pty. Ltd.

Inpex Corporation, a publicly held company, holds 10% or more of the stock, directly or indirectly, of respondent Darwin LNG Pty. Ltd.

Santos Ltd., a publicly held company, holds 10% or more of the stock, directly or indirectly, of respondent Darwin LNG Pty. Ltd.

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STATEMENT OF THE CASE

East Timor occupies the eastern portion of the island of Timor, situated northwest of Australia. Historically a Portuguese colony, East Timor was subsequently for years after 1975 occupied and controlled by its neighbor, Indonesia. On May 20, 2002, East Timor became independent.

Petitioners paint a lurid picture. In their Second Amended Complaint, they alleged that in 2002, upon the very day of East Timor's independence, ConocoPhillips supposedly handed $2 million in cash to Mari Alkatiri, the incoming Prime Minister of the newly independent nation, in order to avoid abrogation of oil and gas concessions in a disputed area of the seabed between Australia and East Timor known as the "Timor Gap." Those concessions had been jointly awarded to ConocoPhillips by Australia and Indonesia back in 1991; ConocoPhillips had subsequently discovered major oil and gas deposits in the concessions; and ConocoPhillips had been actively developing those deposits ever since.

The theory of the Second Amended Complaint was that the new East Timor Constitution supposedly vitiated all previously granted concessions and that, but for the bribery scheme, East Timor would have re-opened the concessions for new bidding and petitioners would have both bid — and won. Rather, that same day of independence, East Timor entered into a treaty with Australia — which, while not resolving the disputed ownership of the Timor Gap — confirmed those previously granted concessions.

As shown by respondents below, assuming the truth of petitioners' bribery allegations,[1] Oceanic's tortuous and highly speculative chain of causation nevertheless failed to meet the requirement of proximate cause as set forth by this Court in *Associated General Contractors v. California State Council*, 459 U.S. 519 (1983), *Holmes v. SIPC*, 503 U.S. 258 (1992), and *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006) — that theory of causation necessarily being that, but for the alleged bribery:

- the government of East Timor would have chosen to abrogate the existing concessions;
- the government of Australia would have gone along with any such abrogation;
- there would have been a new round of bidding for the concessions;
- Oceanic would have chosen to bid in such a hypothetical reopened bidding;
- Oceanic would have had the wherewithal to bid and would have been deemed a qualified bidder by East Timor and Australia;
- Oceanic would have won the hypothetical bidding; and
- Oceanic would have developed the concessions at a profit.

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[1] Respondents in their Answer to the Second Amended Complaint have categorically denied those allegations of bribery and in the District Court demonstrated from matters of public record that the claim was highly implausible. Nevertheless, for purposes of the motion for judgment on the pleadings, the allegations have been presumed to be true. Pet. App. 18a, 23a, 32a.

The District Court — without reference to either *Twombly* or *Iqbal*, the latter case having yet to be decided — granted judgment on the pleadings, examining each of the essential links in that causal chain and finding petitioners' allegations to fall far short of the requisites set forth by this Court in its proximate-cause holdings. Pet. App. 25a-31a.

The Fifth Circuit affirmed the District Court's judgment. Citing the District Court's analysis of the attenuated causal chain that petitioners needed to satisfy, the Fifth Circuit held that "at least some of these circumstances are not plausibly pleaded in Oceanic's Complaint," and in particular, "Oceanic's claims fail to rise above the speculative level, because they fail to address the interests and influence of Australia." *Id.* at 12a. Even assuming, "absent bribery, that East Timor was willing to consider replacing ConocoPhillips with Oceanic," the Court could not find any "reason to believe Australia would have allowed this to happen":

> To the contrary, the Complaint describes Oceanic and Australia as adversaries at every historical stage. It alleges that Australia defied international opinion and subverted Oceanic's Portuguese concession by collaborating with Indonesia after an illegitimate invasion. It alleges that Oceanic supported an unsuccessful ICJ suit to declare that Portugal, rather than Indonesia and Australia, had rights to the Timor Gap. And it alleges, more recently, that Oceanic tried to convince East Timor to turn its back on Australia and build a pipeline to East Timor and a liquified natural gas facility on East Timorese soil, rather than accepting proceeds from a pipeline leading to a new facility in Australia. The Complaint

> provides no plausible grounds to believe Australia would have desired — or tolerated — disruption of its long-standing, extremely lucrative collaboration with ConocoPhillips in response to East Timor, which Oceanic describes as a "new and impoverished island nation," replacing Indonesia as its counterpart across the Gap.
>
> — Pet. App. 13a-14a (footnote omitted).[2]

The Fifth Circuit accordingly concluded that "Oceanic fails to properly plead proximate causation" in that the "causal link is 'overly attenuated,'" and the "alleged violation did not 'le[a]d directly to the plaintiff's injuries.'" Pet. App. 15a.

The Fifth Circuit thereafter denied petitioners' applications for panel rehearing and rehearing *en banc*.

REASONS FOR DENYING THE PETITION

1. There is no conflict of authority. Petitioners offer none of the traditional grounds for certiorari. They invoke no circuit split, no split between a court of appeals and a state court, and no split among state courts. And there is plainly no conflict with any decision of this Court: to the contrary, no less than three decisions of this Court — *Associated General Contractors*, *Holmes*, and *Anza* — as well as firmly established common law, mandated dismissal for lack of proximate cause in that there is a total absence of the required direct, non-speculative

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[2] It may be noted that in its brief in the District Court on the Rule 12(c) motion, Oceanic itself expressly acknowledged that there was an "alignment of interests" between Australia and ConocoPhillips with respect to the concessions and that "Australia favored the status quo." R6639.

relationship between the claimed wrong and the purported injury. And since the courts below issued their rulings, this Court's decision this past January in *Hemi Group v. City of New York*, 130 S. Ct. 983 (2010), directing dismissal on the face of a complaint — and strongly reiterating this Court's *Holmes* requirement of a non-"remote," "direct relation" between the alleged wrongful conduct and the injury claimed, and barring recovery by those only "indirectly harmed by the alleged conduct," *id.* at 989, 991 — has only served to confirm the entire correctness of the Fifth Circuit's decision.

Petitioners make no argument that the Fifth Circuit's decision is not in complete accord with these proximate-cause precedents of this Court: indeed, they chose not to cite any of these controlling decisions. What petitioners complain about instead are supposed "deep and important structural flaws in the pleading doctrines announced in the *Twombly* and *Iqbal* decisions." Pet. 15. Petitioners say those flaws allowed the Fifth Circuit judges to "roam outside the pleadings" to consider their "experience" and "common sense," and they say the court's ruling imposes on plaintiffs a requirement that they "anticipatorily plead defensive matter even before any defenses have been asserted." *Id.* at 13-15.

Having thus characterized — or more to the point, mischaracterized — the Fifth Circuit's decision, petitioners ask this Court to grant certiorari in order to "save *Twombly* and *Iqbal* from themselves, if they may be saved." *Id.* at 14. And if they cannot be saved, then petitioners ask the Court to "reconsider its commitment to *Twombly/Iqbal* altogether." *Ibid.*

This entire argument is baseless. Dismissal here was required under this Court's proximate-cause pre-

cedents without regard to the decisions in *Twombly* and *Iqbal* and hardly presents some opportunity for this Court to "reconsider" those rulings. While the Fifth Circuit cited this Court's decisions in both *Twombly* and *Iqbal* for the governing standards on a motion addressed to the pleadings, Pet. App. 10a, 12a, 13a, 14a — as it well should — the result in this case would necessarily have been the same under this Court's proximate-cause rulings with or without those decisions. *Cf. Hemi Group*, 130 S. Ct. at 983-94 (directing dismissal on face of complaint; no mention of *Twombly* or *Iqbal*).

2. Petitioners' claims fail for lack of proximate cause. The decisions below are entirely correct. The ground for dismissal of this case is straightforward: petitioners do not satisfy the pleading requirements of proximate cause. There is a total absence of any showing of the required direct, non-remote, non-speculative relationship between the claimed wrong and the purported injury. Petitioners' causes of action are accordingly barred by four decisions of this Court, *Associated General Contractors*, *Holmes*, *Anza*, and *Hemi Group*.

In 1983, in *Associated General Contractors*, this Court held that Congress intended the common-law requisites of proximate causation and directness of injury to apply to antitrust damage litigation, and concluded that such suits "would be subject to constraints comparable to well-accepted common-law rules applied in comparable litigation," including the essential elements of "proximate cause, directness of injury, [and] certainty of damages." *AGC*, 459 U.S. at 529, 532-35 (footnotes omitted). In 1992, then, in *Holmes*, this Court held that the RICO statute similarly adopted the common-law "demand" for a "direct

relation between the injury asserted and the injurious conduct" alleged, characterizing this "requirement" as "one of [the] central elements" of proximate causation. 503 U.S. at 268-69. Then in 2006, in *Anza*, this Court, in upholding a dismissal on the face of the complaint, further delineated the requirement of direct injury, emphasizing the need for certainty of damages, the impermissibility of an indirect and speculative link between the alleged misconduct and the pleaded injury, and the requirement that the plaintiff be the direct victim of the claimed wrongdoing. And finally, this January, in *Hemi Group*, this Court, reiterating the "direct victim" requirement, likewise — without reference to either *Twombly* or *Iqbal* — directed dismissal on the face of the complaint and yet again reaffirmed that a link between misconduct and injury that is "'too remote,' 'purely contingent,' or 'indirec[t]' is insufficient" to satisfy proximate cause. 130 S. Ct. at 989-90.[3]

As noted above, to find any connection between the alleged bribery scheme and any injury to Oceanic, the causal chain would require that, absent the alleged bribes:

- the government of East Timor would have chosen to abrogate the existing concessions;
- the government of Australia would have gone along with any such abrogation;
- there would have been a new round of bidding for the concessions;

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[3] It may be noted that, *if* there had been a bribery scheme here that deprived East Timor of gaining higher gas and oil revenues from the Timor Gap, the "direct victim" of such wrongful conduct under *Anza* and *Hemi Group* would nevertheless be the nation of East Timor and its citizenry — not petitioners.

- Oceanic would have chosen to bid in such a hypothetical reopened bidding;
- Oceanic would have had the wherewithal to bid and would have been deemed a qualified bidder by East Timor and Australia;
- Oceanic would have won the hypothetical bidding; and
- Oceanic would have developed the concessions at a profit.

This chain of causation — recognized as necessary by both courts below — is indirect and speculative in the extreme. Under *AGC*, *Holmes*, *Anza*, *Hemi Group*, and the common law principles that form the bedrock of those decisions, the causal theory fails on the pleadings as a matter of law.[4]

Insisting "there can be no doubt" they have "adequately stated a claim," petitioners argue the Fifth

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[4] Compounding the speculative nature of any connection between the alleged bribery and petitioners' claimed injury is the fact that a court would need to "deconstruct" the decision-making of two separate sovereigns, East Timor and Australia, in order to divine how those nations would have behaved in the absence of the alleged East Timor bribery scheme. The decisional law indicates that any such attempt to deconstruct governmental decision-making is in and of itself too speculative to be engaged in by courts. *See, e.g.*, *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 377 (1991) ("[W]e have consistently sought to avoid" the "deconstruction of the governmental process and probing of the official 'intent.'"); *In re Tobacco (Guatemala)*, 83 F. Supp. 2d 125, 130 (D.D.C. 1999) (dismissing RICO and related claims: "Few inquiries are more speculative than this. In other contexts, courts traditionally have been reluctant to deconstruct the reasons for governmental decision-making because of the great number of subjective influences at play."), *aff'd sub nom.*, *Service Employees v. Philip Morris*, 249 F.3d 1068 (D.C. Cir. 2001).

Circuit viewed their pleading "through an improper filter" that required them to "overcome defenses that had not been asserted at the time the complaint was filed." Pet. 33, 32. And as if this were some breach-of-contract case, petitioners argue that Australia's required approval of an abrogation of ConocoPhillips' concessions was merely a "condition subsequent" to a (non-existent) "contract between Oceanic and East Timor" — and thus an issue on which the defense has the burden of proof. *Id.* at 35-36. This is truly frivolous: this is not a breach-of-contract case between Oceanic and East Timor. It is a RICO, antirust, and common-law tort action against ConocoPhillips claiming that the asserted bribery scheme deprived Oceanic of the opportunity to gain rights in the Timor Gap by bidding upon and winning some hypothetical bidding contest that would follow abrogation of existing concessions. Under *AGC*, *Holmes*, *Anza*, and *Hemi Group*, it is an essential element of petitioners' *affirmative* case to adequately plead "'some direct relation between the injury asserted and the injurious conduct alleged.'" *Anza*, 547 U.S. at 457 (quoting *Holmes*, 503 U.S. at 268). Petitioners have not done so. Pet. App. 12a-15a, 27a-32a.

Petitioners have no answer to *AGC*, *Holmes*, *Anza*, and *Hemi Group*: accordingly, they choose simply to ignore these controlling decisions of this Court.

3. *Twombly* and *Iqbal* do not affect the outcome here. Notwithstanding petitioners' attempt to re-cast this as a case about *Twombly* and *Iqbal*, those cases do not determine the outcome here. While the Fifth Circuit indeed cited to this Court's holdings in these cases in articulating governing pleading standards and noted that certain of petitioners' allegations were not "plausible," Pet. App. 12a, 13a, 14a,

nothing in the decision turned upon *Twombly/Iqbal*. The outcome would be the same if those cases had never been decided.

Thus, to take just one essential link of petitioners' causal chain — that Australia would have had to acquiesce in any attempt by East Timor to abrogate ConocoPhillips' Timor Gap concessions — petitioners' Complaint is entirely barren of *any* allegation, "plausible" or otherwise, that Australia would have done anything of the sort. To the contrary, as the Fifth Circuit explained in detail, the allegations of the Complaint itself squarely *refuted* any such concept that Australia — which claimed the disputed Timor Gap seabed for itself — would have gone along with any attempt by East Timor to unilaterally abrogate the concessions and put the mineral rights up for re-bidding. *See* pp. 3-4, *supra*. And, as noted above, in their own briefing below, petitioners themselves contradicted any such concept and conceded that there was an "alignment of interests" between Australia and ConocoPhillips and that "Australia favored the status quo." R6639.

If *Twombly* and *Iqbal* have any "deep and important structural flaws," as petitioners contend, this case does not expose them. Petitioners warn that *Twombly* and *Iqbal*, by allowing judges to apply "experience" and "common sense" in evaluating whether a complaint states a plausible claim for relief, liberate judges to wander "outside the pleadings, outside the rules of evidence, and outside the court record." Pet. 15 (quoting *Iqbal*, 129 S. Ct. at 1950). Even if that were true in theory, this is certainly not an appropriate case to re-examine such issues because it is not what happened here.

The reason the complaint failed the Fifth Circuit's "test of common sense plausibility," Pet. App. 13a, was not because of anything "outside the pleadings." Pet. 15. Rather, it was because allegations *in the complaint itself* wholly failed to support, and indeed controverted, petitioners' theory that East Timor could unilaterally abrogate the ConocoPhillips concessions and award them to Oceanic. Pet. App. 13a-14a. In the Fifth Circuit's own words, it was "the Complaint" that "present[ed] no reason to believe Australia would have allowed" Oceanic to replace ConocoPhillips — and indeed, contradicted any such concept — not some extra-record "experience" or "common sense" of the court. *Id.* at 13a.

Even before *Twombly* and *Iqbal* came down, courts were not obliged to accept self-contradictory allegations. Wright & Miller, *Federal Practice & Procedure* § 1363 (2004 ed.). Moreover, as the district court analyzed in detail, *see* Pet. App. 25a-31a, Australia's acquiescence was but one link in an overall speculative, remote, and indirect chain between the alleged wrong and Oceanic's supposed injury.[5]

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[5] Among other things, as the district court noted (*see* Pet App. 29a-30a), the very concept that Oceanic — which was engaged in no oil exploration or development at the time of the hypothetical auction, which had total assets of $3.7 million, whose principal business was that of an employment agency in San Diego, and who otherwise had eight employees — would have been deemed a qualified bidder by East Timor and Australia on this multi-billion-dollar project and would have outbid any number of multinational oil giants, including ConocoPhillips itself, in any such hypothetical bidding contest, is a causal link as to which "Oceanic can only speculate."

4. Conclusory pleading of proximate cause was insufficient before *Twombly* and *Iqbal*. Although petitioners are unwilling to discuss *AGC*, *Holmes*, *Anza*, or *Hemi Group*, they do claim that "proximate cause actually *was* pleaded." Pet. 30 (emphasis in original). Petitioners include no citation to any particulars in their Second Amended Complaint but are presumably referring to certain paragraphs in which they say things like: "Plaintiffs, and each of them, have been injured in their business or property as a *direct and proximate result* of the defendant Conspirators' violations of 18 U.S.C. § 1962(c) . . . ." Pet. App. 153a (emphasis added). That type of naked legal conclusion, without more, is not enough under *Twombly* and *Iqbal* — nor did it suffice previous to those decisions. *E.g.*, *Papasan v. Allain*, 478 U.S. 265, 286 (1986); Wright & Miller, *Federal Practice & Procedure* § 1286 (2004 ed.) ("[A] pleader's conclusory allegations of law, unsupported factual assertions, and unwarranted inferences do not have to be accepted by the federal court as true, particularly on a Rule 12(b)(6) motion to dismiss or a Rule 12(c) for judgment on the pleadings.").[6]

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[6] And it is idle for petitioners to contend that the sufficiency of the Complaint in this action is to be determined by reference to the Official Forms promulgated pursuant to Rule 84 of the Federal Rules of Civil Procedure. None of these Forms pertains to a case of the nature here; those Forms cannot be read to overcome this Court's mandated pleading standards, and of course, those Forms (or their predecessors) were in place when this Court determined *Anza* and *Hemi Group* holding that the complaints were required to be dismissed for failure adequately to plead proximate cause as required by *AGC* and *Holmes*. Those illustrative Forms cannot be read as nullifying this Court's substantive-law rulings in *AGC*, *Holmes*, *Anza* and *Hemi Group*.

Likewise, petitioners' argument that their common-law claims in particular are pleaded adequately — that the common law is somehow more tolerant of indirect and speculative causal connections than the RICO and antitrust statutes (Pet. 29-30) — is fallacious. The very genesis of *AGC*, *Holmes*, *Anza*, and *Hemi Group* is that the proximate-cause requirements of the common law were intended by Congress to be read into the federal antitrust and RICO statutes — not that that the requirements of those statutes stand apart from the common law. *E.g.*, *Hemi Group*, 130 S. Ct. at 989 ("Proximate cause for RICO purposes, we made clear [in Holmes], should be evaluated in light of its common-law foundations."); *AGC*, 459 U.S. at 531 ("The repeated references to the common law in the debates that preceded the enactment of the Sherman Act make it clear that Congress intended the Act to be construed in the light of its common-law background.").

In any event, as the Fifth Circuit noted, Oceanic "present[ed] no argument on appeal that any of its [non-RICO] claims could survive dismissal on proximate causation grounds if the RICO claim d[id] not." Pet. App. 10a-11a. Accordingly, any such argument has long since been waived.

5. Petitioners' remaining arguments have no merit and do not warrant certiorari.

a. There was no difference of opinion between the District of Columbia and the Southern District of Texas. The closest petitioners come to claiming a split of authority is their contention that Judge Sullivan in the District of Columbia and Judge Hughes in the Southern District of Texas supposedly came to different conclusions on the issue of proximate cause. Pet. 7-8. Putting aside that a conflict

between district courts is hardly a basis for this Court's review, petitioners simply misrepresent the record. No issue of proximate cause was ever raised by defendants' motion to dismiss in the D.C. court or ever ruled upon by that court. Rather, the only standing issue raised by that motion — and ruled upon by that court — was Article III, "case-or-controversy" standing, which only requires "but-for," "injury-in-fact" causation rather than proximate cause. *See Plains Commerce Bank v. Long Family Land & Cattle*, 128 S. Ct. 2709, 2717 (2008). Judge Sullivan rejected that defense. Pet. App. 55a-57a.

It was only after denial of that motion, with the action having been transferred to the Southern District of Texas, that defendants, by motion for judgment on the pleadings, raised the ground of lack of proximate cause. And when petitioners asked to strike that motion claiming that Judge Sullivan had already ruled on causation, Judge Hughes correctly distinguished the previous but-for causation issue from the "new issue" of proximate causation that was now before his court. Pet. App. 22a.

b. *Petitioners' claims of "factual misapprehensions" by the Fifth Circuit are misplaced.* Petitioners complain that the Fifth Circuit based its ruling on "significant factual misapprehensions" that "first appeared in the panel's opinion." Pet. 21. They say the panel "wrongly assumes" that the Timor Gap was developed, *ibid.*: but their Complaint alleges that the Timor Gap fields were "currently producing." Pet. App. 137a. They say the "lucrative," "multi-billion dollar" operations that the panel said ConocoPhillips had in the Timor Gap did not exist, Pet. 22: but their Complaint alleges over "US$50 billion" in "known reserves" in the Timor Gap, and "not less than $10.5

billion" in damages from the loss of the opportunity to compete there. Pet. App. 109a, 161a.

c. *Factual denials in respondents' Answer did not bar judgment on the pleadings.* Finally, petitioners argue that this case was inappropriate for judgment on the pleadings because respondents in their answer contested most of petitioners' factual allegations. Pet. 18-20. This is a total *non sequitur*. A motion for judgment on the pleadings is governed by the same standards as a motion to dismiss and — *for purposes of the motion* — assumes all properly pleaded allegations to be true. *See* Wright & Miller, *Federal Practice & Procedure* §§ 1367-1368. Whether a party has previously in its answer denied such allegations is wholly irrelevant to the motion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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